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Introduction

This book aims to promote copyright compliance both by individuals and by organizations.

The text is divided into two main parts. First, the book considers what constitutes an infringement of copyright, and what happens when things go wrong. It reviews what the consequences might be, from a court action through to the various other forms of dispute resolution such as arbitration or mediation.

The second half of the book deals with the question of how to stay within the law, and what one can do pro-actively to minimize the risks associated with copyright infringement.

Library and information professionals take a particular interest in copyright matters, because they find themselves placed in the difficult position of on the one hand being asked by their users to provide access to content while on the other hand needing to be mindful of the legal rights of the creators and distributors of intellectual property.

For the vast majority of people, copyright is not a subject that they wish to study as an academic discipline or an area that is of interest merely for its own sake. Rather, they simply wish to be able to copy material and want to be able to do so in the knowledge and with the confidence that what they are doing is within the law.

Copyright law is extremely complex, and it feels as though you need a

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lawyer with you to be able to say with any degree of certainty whether copying something is allowed under the law or whether it would constitute copyright infringement.

Consulting a copy of the legislation to see what the law on copyright actually says is not as easy or as straightforward as it ought to be. While it is true that one can quickly consult a copy of the Copyright Designs and Patents Act (CDPA) 1988 on the OPSI website, it will not be of much practical use because it only shows the law as it was passed in 1988, and it does not show the law as it currently stands. The CDPA 1988 has been significantly amended over the years since it was published. It has been amended by a number of Acts, such as the Broadcasting Acts of 1990 and 1996, the Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002, the Copyright (Visually Impaired Persons) Act 2002, the Legal Deposit Libraries Act 2003, and the Government of Wales Act 2006, as well as by secondary legislation – the many statutory instruments which interpret and modify it. The Copyright and Related Rights Regulations 2003 is the most significant item of subsidiary legislation to amend the CDPA 1988.

There are a number of sources available for annotated copies of the legislation and these include *Blackstone's Statutes on Intellectual Property* and *Butterworths Intellectual Property Law Handbook* (see 'Further information' at the end of this book for details).

See also:

- unofficial consolidated version of Parts I, II and VII of the CDPA 1988, www.ipo.gov.uk/cdpact1988.pdf
- the Statute Law Database www.statutelaw.gov.uk, although the copyright legislation on the Statute Law Database has not been brought completely up to date at the time of writing.

It is also important to recognize that in England and Wales our laws are not made up solely on the basis of statute law. In addition to statute law there is also case law, which has a crucial role to play in helping us to understand how the legislation applies in a particular set of circumstances.

1.1 Copyright compliance is both a legal and an ethical issue

Respecting copyright or any other intellectual property rights is not sim-

ply a question of obeying the law. In addition to being a legal requirement, it is also an ethical issue. CILIP, the professional body for information staff, has a code of professional ethics. Entitled ‘Ethical principles and code of professional practice for library and information professionals’ (www.cilip.org.uk/policyadvocacy/ethics), the code states that

The conduct of members should be characterised by . . . respect for, and understanding of, the integrity of information items and for the intellectual effort of those who created them.

It goes on to say: ‘Members should . . . defend the legitimate needs and interests of information users, while upholding the moral and legal rights of the creators and distributors of intellectual property.’

In 2007 CILIP launched an Ethics website, and one of the case studies from that site is of relevance here, although there isn’t currently a case study which looks directly at the ethical issues involved in copyright compliance. See: ‘The subscription cheat? Is it correct to subscribe to a journal as a personal copy “donated” to the information centre, rather than pay a higher institutional subscription rate?’ (www.infoethics.org.uk/CILIP/admin/index.htm, case study number 1).

1.2 Policing acts of copying

Copyright is in place largely to protect commercial interests; it is not there solely to catch people copying illegally in libraries. Information professionals are not the ‘copyright police’, acting on behalf of rightsholders, but they do nevertheless have to be seen to be obeying the law and not prejudicing people’s livelihoods.

The Copyright Licensing Agency’s (CLA’s) guidance on its sticker scheme, which is designed for walk-in users of public libraries, says that

librarians are not required to monitor private copying or police the use of the Sticker Scheme. It is for each patron at a self-service copier to decide whether or not their copying is for commercial purposes and, if so, whether to ask you for a Sticker.

There are a number of enforcement agencies and rightsholders or their

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representatives who may take action against copyright infringers.

The IP Crime Group, established by the UK Intellectual Property Office working in collaboration with its many partners (such as the Serious Organized Crime Agency, Assets Recovery Agency, Her Majesty's Revenue and Customs, Crown Prosecution Service, and local enforcement agencies such as trading standards organizations), produced the national IP Crime Strategy (www.ipo.gov.uk/ipcrimestrategy.pdf). The Annual Enforcement Report measures UK intellectual property crime (www.ipo.gov.uk/crime/crime-enforcement-role/crime-enforcement-report.htm).

The collective licensing societies such as the CLA and the Newspaper Licensing Agency (NLA) do act against infringers. The Copyright Licensing Agency, for example, has a Compliance Unit which investigates the unauthorized copying of books, journals and magazines by business, education and government and, where appropriate, takes legal action in conjunction with authors and publishers. Where necessary, it has been known to employ private investigators in order to verify whether the copying being undertaken is infringement.

Through its Copywatch initiative and website (www.copywatch.org), the CLA offers rewards of up to £20,000 for reliable information about illegal photocopying or scanning leading to a successful licensing outcome or to a legal action.

The narrowing of the 'fair dealing' exception from 31 October 2003 (see section 1.3 of this chapter) eliminated the vast majority of situations where commercial organizations could legitimately copy copyright materials without the rightsholder's permission or a CLA licence.

According to CLA's annual review for 2003:

CLA's view is that those organisations which are licensed are assumed to be generally compliant, and that if they commit an infringement – unless it is blatant or on a large scale – the matter will be dealt with through dialogue and agreement. However, unlicensed organisations, especially if they have refused to take out a licence when offered, or have delayed unreasonably in doing so, are not regarded in a favourable light. CLA's Copyright Compliance Unit was established under the leadership of a former detective chief inspector of police in order to tackle the problem of consistently non-compliant organisations.

More recently, the CLA's annual review for 2007 say: 'A campaign of legal action, allied with targeted advertising and PR, successfully brought the NHS in England back to the negotiating table and in March we were delighted to announce a new agreement to restore the central licence that the NHS had previously decided not to renew.'

There are a number of other organizations which exist on behalf of rightsholders in order to protect their interests against piracy and illegal copying. These include:

- the Federation Against Software Theft (www.fast.org.uk), which was set up in 1984 by the British Computer Society copyright committee
- the Business Software Alliance (www.bsa.org), which claims to be the voice of the world's commercial software industry and to educate consumers on software management and copyright protection, cyber security, trade, e-commerce and other internet related issues
- Anti Copying In Design (www.acid.uk.com) was created in 1996 by designers to combat the growing threats of plagiarism in the design and creative industries
- Federation Against Copyright Theft (www.fact-uk.org.uk) was formed in 1984 to combat counterfeiting, piracy and misuse of its members' products.

1.3 Why is there so much legal uncertainty?

One thing which it is important to say right from the outset is that it is not possible to give black and white statements relating to copyright compliance which will apply in all circumstances. Rather, it is best to try instead to think through the process of deciding whether an act of copying is legal or not; and to highlight any areas of particular risk (see also Chapter 4, which breaks down various activities into low, medium and high risk).

It is not easy to interpret how copyright law applies in a specific set of circumstances, and there are several reasons for this.

One reason relates to the role of case law in the legal system of England and Wales. Reported cases present specific problems out of which a point of law is extracted. Formulation of the law is bottom up, from a specific

event to a general principle. The point of law is known as a precedent and it is binding on other courts which are at the same or a lower level in the hierarchy. The same decision must result from another situation in which the relevant facts are the same. The law evolves by means of opinion changing as to which facts are relevant, and by novel situations arising.

Often you can only be sure that something is on the right side of the law when a judge says that it is so in court, which is a little bit late in the day. It is because there is so much legal uncertainty that copyright issues are really a matter of working out how best to minimize the risk of legal action being taken against you.

The second reason for there being so much legal uncertainty is that the key words and phrases appearing in the CDPA 1988 – the ones which make the difference between something being legal as opposed to its being illegal – are not defined; and in many cases this is quite deliberate. Undefined terms include:

- original
- substantial (and substantially)
- reasonable (and reasonably)
- fair dealing
- copying for a commercial purpose.

Original

Section 1 of the CDPA 1988 says that ‘Copyright subsists¹ in original literary, dramatic, musical or artistic works’. The word ‘original’ is not defined in the Act, but various judges have considered the requirements of originality and they have said that for a work to be original it must be the result of the expenditure by the author of skill, judgement and experience, or labour, skill and capital.

Substantial (and substantially)

Copyright is not infringed unless the whole or a substantial part of a work has been copied (CDPA s.16(3)(a)). The problem is that ‘substantial’ could be qualitative as well as quantitative.

Reasonable (and reasonably)

Section 39 of the CDPA 1988, which deals with copying of published works by librarians, requires ‘that no person is furnished with more than one copy of the same material or with a copy of more than a *reasonable* proportion of any work’.

While this is not set out in the legislation, the generally agreed safe copying limit for a published work is considered to be one chapter or 5% of extracts.

Fair dealing

The CDPA 1988 contains four fair dealing exceptions.² They are:

- fair dealing for the purposes of non-commercial research
- private study
- news reporting
- criticism or review.

The Act does not define what constitutes ‘fair dealing’. It does, however, give us some pointers as to what would *not* be classed as fair dealing. With regard to fair dealing for the purposes of non-commercial research or private study, section 29(3) of the CDPA says:

L Copying by a person other than the researcher or student himself is not fair dealing if in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

Section 29(4) of the CDPA says that it is not fair dealing to convert a computer program expressed in a low-level language into a version expressed in a higher-level language or incidentally, in the course of so converting the program, to copy it (these being acts permitted if done in accordance

with section 50B – decompilation).

Section 29(4)(a) says that it is not fair dealing to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program (these acts being permitted if done in accordance with section 50BA – observing, studying and testing).

Commercial purpose

Copying for a ‘commercial purpose’ is not defined in the legislation. The UK Intellectual Property Office (IPO) took the view that it cannot define what is copying for a commercial purpose because it is the European Court of Justice that has the final say; and, in any case, if the IPO were to try to define it, it might well result in less flexibility for libraries and researchers.

The test is whether the research is for a commercial purpose, not whether it is done by a commercial body. The key factor is therefore the *purpose* for which the copying is done.

The law cannot expect you to do more than decide what is the case on the day you ask for the copy – this could be relevant when the commercial purpose is as yet unknown or undefined. If there is no commercial purpose on the day the copy is requested, then it would seem reasonable to sign the declaration form (see Chapter 8, section 8.4) as non-commercial.

Some research in a commercial environment could be classed as non-commercial if the purpose were entirely unconnected with the employer’s commercial objectives, but such cases will be very rare.

In CDPA section 178, a section of minor definitions, the definition of ‘private study’ says that ‘private study does not include any study which is directly or indirectly for a commercial purpose’.

For further information on what would constitute copying for a commercial purpose it is worth looking at the BL/CLA joint guidance note entitled ‘Copyright Office: changes to UK copyright law’ (www.bl.uk/reshelp/atyourdesk/docsupply/help/copyright/copyrightfaq/).

1.4 Terminology used in the Database Regulations

It is also worth looking at the Database Regulations (SI 1997/3032), and

the key words and phrases within those regulations.

The Database Regulations introduced a new *sui generis*³ right to prevent extraction and re-utilization of all or a substantial part of a database. According to section 3A of the CDPA 1988, the definition of a database is:

- L** a collection of independent works, data or other materials which –
- a) are arranged in a systematic or methodical way and
 - b) are individually accessible by electronic or other means.

The statement that the Regulations relate to material which is accessible by electronic or other means shows that a ‘database’ could be either electronic or hard copy. The definition of a ‘database’ would encompass many websites, as well as collections of data in the form of directories, encyclopaedias, statistical databases, online collections of journals and multimedia collections.

The case of *British Horseracing Board Ltd and others v William Hill Organization Ltd* is all about how the Database Regulations should be interpreted. When the case reached the Court of Appeal, the judge referred a series of questions to the European Court of Justice (ECJ) (Case C-203/02) and asked for a ruling on the meaning of the key terms in the Regulations, which in turn implemented Directive 96/9/EC on the legal protection of databases.

In November 2004, the ECJ gave its judgment and interpretation of the Database Right in four cases referred to it (the cases were the *BHB v William Hill* case, along with three cases relating to football fixtures). The judgment conflicted with previous interpretations and also with the opinion of the Advocate General.

The necessary investment in a database is limited to that which relates to the seeking out of independent materials or data and the collection of them in a database and not to the resources used for the creation of the materials or data.

In order for infringement by means of extraction or re-utilization to occur, this must be extraction or re-utilization of a substantial part of the database; and the phrase ‘substantial part’ would be decided in terms of both quality and quantity.

The definitions of 'extraction' and 're-utilization'

'Extraction', in relation to any contents of a database, means the permanent or temporary transfer of those contents to another medium by any means or in any form.

'Re-utilization', in relation to any contents of a database, means making those contents available to the public by any means.

The qualitative test looks at the scale of the investment in obtaining, verifying or presenting the data and the intrinsic value of the material being extracted or re-used. The qualitative test of infringement will be much harder to pass if there is no input into or verification of the data beyond the resources used for its original creation.

The quantitative test relates to the quantity of data taken. Where only a small proportion of the whole of the database is being used, it may not be sufficient to amount to infringement on quantitative grounds. However, 'substantial' would be measured in terms of quantity or quality or a combination of both.

Repeated extraction or re-utilization of insubstantial parts of a database will not infringe unless it seriously prejudices the owner's investment in the database; and this would be likely to require the repeated taking of insubstantial parts in a way which constituted making available to the public the whole or a substantial part of the content of the database.

The European Court of Justice found that there were no ownership rights over the data or content as such, but only in the collection, verification and presentation of that content.

The judgment dramatically reduced the scope of database right protection from what people had previously thought the legislation actually meant. To receive protection under the law, the owner of a database who is also the creator of the materials collected needs to be able to demonstrate that there has been a distinct investment in the database as such, and this would be extremely difficult to prove in instances where the verification of data takes place at the time of creation.

Database creators who want to ensure that their databases are adequately protected therefore need to think very carefully about the way in which the data was created, collected and verified.

For additional information, see the ECJ press release outlining the judgment, <http://curia.europa.eu/en/actu/communiques/cp04/aff/cp040089en.pdf>.

Notes

- 1 Copyright cannot exist by itself but only within the work which has been created. It is for this reason that we say that copyright 'subsists' rather than 'exists'.
- 2 In the past, copyright experts referred to three types of fair dealing. I would, however, contend that there are actually four types, given that the changes to the legislation which took place in 2003 made a much clearer distinction between fair dealing for research as opposed to research for the purposes of private study.
- 3 'Of its own kind', with unique characteristics. Database right is a *sui generis* right because it is a right that is directed at a unique category of materials – in this case databases.